

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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*Affiliations appear only
for purposes of identification.*

May 23, 2006

Hon. Peter Hoekstra
Chairman
Permanent Select Committee on Intelligence
H-405, The Capitol
Washington, D.C. 20515

Hon. Jane Harman
Ranking Member
Permanent Select Committee on Intelligence
H-405, The Capitol
Washington, D.C. 20515

Dear Chairman Hoekstra and Ranking Member Harman:

I am writing in reference to the House Permanent Select Committee on Intelligence's review of unauthorized disclosures of classified information and the related May 26 public hearing on the Media's Role and Responsibilities on Leaks of Classified Information.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors working to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Reporters Committee assists journalists by providing free legal information via a hotline and by filing *amicus curiae* briefs in cases involving the interests of the news media. It produces several publications by which it informs thousands of journalists and lawyers about media law issues, including its quarterly magazine, *The News Media and the Law*, and biweekly newsletter, *News Media Update*, and provides up-to-the minute media law coverage on its website, <http://www.rcfp.org/>. As both a news organization and an advocate of free press issues, the Reporters Committee has a strong interest in laws that would criminalize reporters' publication of classified information.

Leaks to the media, even of classified information, have served as a source of information to the public about vital issues and government operations.

Punishing the press for publishing government secrets conflicts with a basic principle on which our democracy was founded - public accountability. Indeed, the title of the May 26 hearing - "Media's Role and Responsibilities on Leaks of Classified Information" - properly captures this notion: the media plays an important *role* and bears a significant *responsibility* to shed light on

government activities to enable government accountability and informed public debate. Amidst the maelstrom of speculated national harm and arguably unconstitutional threatened prosecutions, we urge the Committee not to lose sight of the media's fundamental, constitutionally protected role.

In our experience, journalists handle sensitive information responsibly. National security reporters tell us that they use a multi-step vetting process to decide whether to print classified information. They consult several sources to confirm the classification of the information received and ask their contacts to identify what foreseeable harm could result from its publication. They then discuss with their editors and, when needed, legal counsel, the information and their contacts' perception of the potential harm of disclosing the information. Journalists tell us that they are more likely to publish a story over objections if the contact fails to articulate reasons, or it appears that the damage feared is personal.

The recent investigative stories published in *The Washington Post* and *The New York Times* demonstrate the discretion that reporters, editors, and publishers exercise with stories containing classified information. Though Dana Priest reported the existence of the CIA's overseas detention centers in Eastern European countries, she declined to reveal their location at the request of senior U.S. officials.¹ And after the White House asked the *Times* not to publish James Risen and Eric Lichtblau's story on the NSA wiretapping program to prevent jeopardizing pending terrorist investigations, the paper delayed publication for a year and omitted some information that administration officials argued could be useful to terrorists.²

The Pentagon Papers is perhaps the most famous example of how classified information has helped stimulate public debate on significant issues. In that instance, a 1971 *New York Times* story³ was the first of a series of reports that published leaked portions of a classified report about U.S. government actions in Vietnam. The information revealed that, despite ardent promises to the contrary by Presidents Lyndon Johnson and Richard Nixon, the government had intentionally expanded its participation in the Vietnam War, amputating the Nixon administration's already crippled credibility.

Several years later, a leak resulted in a *New York Times* story⁴ that the National Security Agency (NSA) eavesdropped on citizens' international communications and led the

¹ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, *The Washington Post*, Nov. 2, 2005 at A01.

² James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers without Courts*, *The New York Times*, Dec. 16, 2005 at A01.

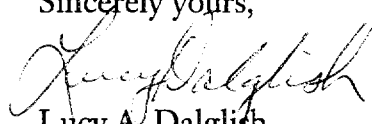
³ Anthony Russo, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, *New York Times*, June 13, 1971 at 1.

⁴ Nicholas Horrocks, *National Security Agency Reported Eavesdropping on Most Private Cables*, *The New York Times*, Aug. 8, 1975 at 1.

U.S. Senate's Church Committee and the Rockefeller Commission to expose two NSA programs that abused Americans' privacy. One of the spy programs, Shamrock, was a 30-year program through which the agency and its predecessors collected copies of international telegrams leaving or entering the United States from the major telegraph companies. The other spy program, Minaret, produced a watch list of American activists against the Vietnam War or others who had political stances that interested the government. After significant investigations, the programs were ordered ceased.

History demonstrates that previous classified information leaks have benefitted the public, just as the current public has benefitted from recent news coverage. It is unclear what harm, if any, may have been caused by the recent Pulitzer Prize winning stories by the *New York Times* and *Washington Post*. But aside from general speculation about how these revelations have jeopardized our country, it is doubtful the degree of damage exceeds the benefit of increased public awareness of these government activities. Both stories sparked tremendous public debate and invited the public to more closely scrutinize the decision-making of high government officials.⁵ In other words, the stories fulfilled the watchdog role that is the media's duty to perform.⁶ To the extent that criticism of these stories inspired the House Permanent Select Committee on Intelligence to consider taking action to punish the press's handling of classified information, we urge the Committee to first determine what injury, if any, these stories caused and avoid taking action on mere allegations of harm.

Sincerely yours,



Lucy A. Dalglish
Executive Director

⁵ See, e.g., Charles Babington and Dafna Linzer, *More Lawmakers to be Privy to Classified Briefings*, The Washington Post, May 17, 2006 at A07; Associated Press, *Domestic Spying Inquiry Killed*, May 10, 2006; *Pelosi Requests Review of Decision to Classify Information on NSA Surveillance Program*, Pelosi Press Release, May 2, 2006; *Leahy, Kennedy Press for Information on Court Cases Potentially Compromised by Bush Administration's Illegal Domestic Spying Program*, Leahy Press Release, March 21, 2006; Dan Eggen, *Justice Dept. Role in Eavesdropping Decision Under Review*, The Washington Post, Feb. 26, 2006 at A04; Elizabeth B. Bazan and Jennifer K. Elsea, *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information*, Congressional Research Service Report, Jan. 5, 2006; CNN.com, *Two Groups Sue Over NSA Wiretap*, Jan. 17, 2006; CNN.com, *Gonzales Defends NSA, Rejects Call for Prosecutor*, Jan. 17, 2006 (Gonzales defends NSA program on Larry King Live); The Hotline, *Alito on Eavesdropping and the Balance of Power*, National Journal, Jan. 10, 2006 (Sen. Specter asked then-Supreme Court nominee Samuel Alito whether the Constitution permits presidents to order domestic wiretapping). See also Douglas Jehl, *Senate is Set to Require White House to Account for Secret Prisons*, The New York Times, Dec. 15, 2005 at A25; Reuters, *US Senate Demands Report on CIA Prisons*, Nov. 11, 2005; Stephanie Nebehay, *Red Cross Seeks Access to CIA Prison*, Reuters, Nov. 3, 2005.

⁶ "The role of the media is important; acting as the 'eyes and ears of the public,' they can be a powerful and constructive force, contributing to remedial action in the conduct of public business." *Houchins v. KQED*, 438 U.S. 1, 8 (1978).